DATE ISSUED: August 27, 1997

CASE NO: 94-INA-531

In the Matter of:

NONFERROUS B. M. CORP.,
Employer

On Behalf of

WEI ZHOU,
Alien.

Appearance: Ronald H. Fanta, Esquire
New York, NY
for the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Wei Zhou ("Alien") filed by Employer Nonferrous B.M. Corp. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to

make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On July 5, 1993, as amended, the Employer filed an application for labor certification to enable the Alien, a Chinese national, to fill the position of Technical Writer for an Import/Export Company at the yearly salary of $30,354. (AF 4). The job duties were described as:

> Employee will be required to prepare feasibility studies and proposals, . . . as reports, contracts and other documents entailing the employer's international trade projects and agreements with the People's Republic of China, Hong Kong and the Republic of China. Employee will draft business and trade documents and agreements for submission to overseas companies.

(AF 34). The educational requirement was four years of college, with a Bachelor's degree in English. The experience required was one year in the job offered. Special requirements were listed as: "Fluency in the Chinese (Mandarin and Cantonese dialects) languages required" (AF 4). According to the application, the Alien had been employed as a Technical Writer by the Employer from April 1993 until the present, and he was employed by another Export/Import company as a technical writer from May 1991 to March 1993 (AF 1). The application was supplemented with an October 22, 1993 statement of business necessity for the foreign language requirement as well as the other job requirements from the Employer's President, Sherry Liu. Ms. Liu indicated that due to the need to consult with Chinese officials prior to drafting reports and contracts, the person hired would utilize written or spoken Chinese in excess of 70% of his or her time. (AF 16-17). Although the job opportunity was advertised in the ***New York Times***, no referrals or applications were received. (AF 21-32).

On May 27, 1994, the CO issued a Notice of Findings in which she concluded that the application was violative of 20 C.F.R. § 656.21(b)(2) because the Employer has failed to provide sufficient documentary evidence establishing business necessity for the foreign language requirement, as required by that section. The Employer was advised to delete the Mandarin and Cantonese language requirements and agree to readvertise or to provide documentation relating to specific issues raised by the CO concerning the percentage of people to be dealt with who cannot communicate in English and those who cannot communicate in Mandarin, the percentage of the business dependent on the language, how the absence of the language should adversely impact business, the percentage of time the worker would use each language by necessity, how the Employer has dealt with the language requirement previously, and any other documentation showing fluency in Mandarin and Cantonese is essential to the business. (AF 33-35).

The Employer submitted rebuttal consisting of another letter dated June 21, 1994, from its President. (AF 36-88). In its letter, Employer explained that it was in the business of exporting nonferrous and ferrous metals to Asia. (AF 87). Its business transactions are completed in English, Mandarin Chinese and Cantonese Chinese. (AF 87). Employer stated that:

> "In order to understand why we are requiring this foreign language ability, it is necessary to understand the nature of our company. Nonferrous B. M. Corp. Is involved in extensive multi-national business transactions between the U.S. and Asia, with **virtually all** of our business transactions take (sic) place in Hong Kong and the Peoples Republic of China. . . . To that end, it is necessary that we employ a person with experience as a technical writer who possesses this foreign language ability.

(AF 86 **emphasis added**). Employer estimated that the technical writer would be dealing with over 50 companies from Hong Kong and the People's Republic of China, and that the people in these companies do not communicate fluently in English. (AF 86). Employer then listed some of these 50 companies, all of which are in the People's Republic of China or Hong Kong. Employer also provided a sample list of almost weekly business meetings that the technical writer was required to attend. (AF 85-83). In support of its assertion that its business requires the use of the Chinese language on a regular basis, and that the technical writer would be required to communicate regularly in Mandarin Chinese and Cantonese Chinese, Employer stated that the technical writer would be:

> dealing with approximately 83 Chinese speaking clients in P.R. China & Hong Kong, and 59 English speaking merchant[s] from [the] U.S. and other countries in carrying out their (sic) job duties as a technical writer for this company. We would estimate that over 90% of the individuals that this person will be required to communicate with on a regular basis are unable to communicate in the English language and rely upon the Cantonese or Mandarin dialect (sic) of the Chinese language as their sole and principal form of communication.

(AF 83). Employer asserts that were it required to separately hire a translator, instead of a technical writer with the triple language requirement, it would lose business to its competitors.

On July 5, 1994, the CO issued a Final Determination denying the application in which she stated that the foreign language requirement had not been supported by a showing of business necessity, as required by 20 C.F.R. § 656.21(b)(2), because the Employer had failed to document business necessity for two Chinese languages, Mandarin and Cantonese, and the Employer's response to the questions posed was obscure. (AF 89-92).

The Employer requested reconsideration and, in the alternative, review of that denial by letter of August 1, 1994. (AF 93-218).

The Employer's Statement of Position was filed on October 4, 1994.

DISCUSSION

As indicated above, Employer filed a request for reconsideration along with its request for administrative judicial review (AF 218), yet the CO did not rule on the motion. The request for review was docketed on August 30, 1994. We have held that the CO must rule on a timely motion for reconsideration, and a failure to do so will result in a remand. ***Harry Tancredi***, 88-INA-141 (Dec. 1, 1988). In the matter at hand, Employer's request for reconsideration and review contains new material not already considered by the CO. While it is proper to submit additional evidence to the CO for review along with a motion for reconsideration, it need not be considered by the CO and made a part of the record. Regardless of whether the CO considers the motion or summarily dismisses it, the CO must issue a ruling on the motion. *Id*. Given the CO's disregard of Employer's motion for reconsideration and newly submitted evidence, it appears unlikely that the CO would change her determination on reconsideration. Under the particular facts of this case, and in light of the time the petition for review has been pending and the unlikelihood of a different result on reconsideration, the interests of justice and judicial economy require that the petition be adjudicated on its merits. The CO is reminded of the need to act in writing on all motions for reconsideration, regardless of whether a summary denial is issued.

Although Employer submitted additional evidence along with its motion for reconsideration, it cannot be considered herein. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statements of position or legal briefs. 20 C.F.R. §656.27(c). ***See also*** 20 C.F.R. § 656.26(b)(4). Thus, our review will be limited to the record before the CO.[1]

In the instant case, the single issue before us is whether there has been a showing of business necessity for the foreign language requirement of fluency in both the Mandarin and Cantonese dialects of the Chinese language.

The pertinent regulations provide that the job opportunity shall not include a requirement for a language other than English unless the employer documents that the foreign language requirement arises from business necessity. ***See*** 20 C.F.R. § 656.21(b)(2)(i); ***Advanced Digital Corporation***, 90-INA-137 (May 21, 1991). In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***). The business necessity standard set forth in ***Information Industries, supra,*** is applicable to a foreign language requirement. ***Coker's Pedigreed Seed Co.***, 88-INA-48 (Apr. 19, 1989) (***en banc***). The first prong of the business

[1] In view of our reversal of the CO's denial of certification, Employer is not disadvantaged by consideration of the case on the merits, without the benefit of the documents supplied with the motion for reconsideration.

necessity test for a foreign language requirement is met if the employer establishes the existence of a significant foreign language speaking clientele; the second prong is met if the evidence establishes that the employee's job duties require communicating in that language. ***See Details Sportswear,*** 90-INA-25 (Nov. 30, 1990); ***Hidalgo Truck Parts, Inc.***, 89-INA-155 (Mar. 15, 1990). A foreign language requirement may be justified by plans for expansion of business into a foreign market. ***Remington Products, Inc.,*** 89-INA-173 (Jan. 9, 1991) (***en banc***). It may also be justified when the business requires frequent and constant communication with foreign-speaking personnel. ***Capetronic USA Manufacturing, Inc.,*** 92-INA-18 (Apr. 12, 1993); ***Bestech Group of America, Inc.,*** 91-INA-381 (Dec. 28, 1992). ***See also Sysco Intermountain Food Services,*** 88-INA-138 (May 31, 1989) (***en banc***) (business necessity for knowledge of Cantonese and Mandarin dialects shown when contacts with restaurant owners and suppliers require communication in Chinese).

Taken as a whole, it is our view that the Employer's documentation in the instant case is sufficient to satisfy the standard set forth in section 656.21(b)(2)(i)(C), which requires that the language requirement be "adequately documented as arising from business necessity." The CO required Employer to document the "total number of people that he deals with and the percentage of those people he deals with who cannot communicate in English; the number and percentage, who cannot communicate in Mandarin." (AF 80). To that extent Employer stated "approximately 83 Chinese speaking clients in P.R. China & Hong Kong, and 59 English speaking merchant[s].]" (AF83). Specifically, the technical writer "will be dealing with over 50 companies from these two countries. The individuals that this person will be dealing with ... do not communicate fluently in the English language." (AF86). The CO required Employer to document "[t]he percentage of his business that is dependent upon each language." (AF80). Employer explained that "virtually all" of its business transactions takes place in Hong Kong and the People's Republic of China. (AF 87). Employer also supplied a list of its clients which showed their addresses, and portions of its phone bills which showed what countries it called. (AF 85,86, 55-59). It is evident that the CO is unaware that the primary dialect spoken in the People's Republic of China is Mandarin, and the primary dialect spoken in Hong Kong is Cantonese. It is not so far fetched that Employer assumed such knowledge was common, at least to the CO, and that Employer used the countries in place of the dialects spoken there in explaining the business necessity for the two dialects.[2] In response to how the absence of a technical writer without knowledge of both Chinese dialects would adversely impact its business, Employer flatly stated that it would lose business to the competition that had such employees. Employer's position is that having a translator-technical writer employee all rolled into one, it can more efficiently transact with its clients and more effectively compete. Employer has adequately addressed the

[2] Employer's stating that its clients are from the People's Republic of China and Hong Kong, necessarily means that their primary languages are Mandarin and Cantonese, respectively. This is analogous to saying that someone is from Brazil and someone is from Columbia and then not explaining that the person from Brazil speaks Portuguese and the person from Columbia speaks Spanish. Both Brazil and Columbia are in South America and their languages look and sound similar, but they are not the same language.

need for the two dialects in its rebuttal to the NOF, in that it is reasonably specific and indicates the basis for its assertions. *See generally*, ***Gencorp***, 87-INA-659 (January 13, 1988).

Accordingly,

ORDER

The Final Determination of the Certifying Officer denying certification is hereby **REVERSED** and the Certifying Officer is directed to **GRANT** certification.

SO ORDERED.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Nonferrous B. M. Corp. (Wei Zhou, alien)

Case No. : 94-INA-531

Title : Decision and Order

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date:

PLEASE TAKE NOTE: This case has been rewritten by Janet Henner to address Judge Huddleston's concerns about the delay if we were to remand.